APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,176

DAN LEE WHITE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before VOGEL, LAY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Appellant Dan L. White was found guilty, after a jury trial, of willfully failing to comply with an order of his draft board directing him to report for and submit to induction into the armed forces of the United States, such refusal being in violation of § 12 of the Universal Military Training and Service Act, 50 U.S.C. App. § 462.[1] He was sentenced to five years imprisonment and has appealed. We affirm the conviction.

White first registered with his Des Moines local board in March of 1959. On July 24, 1964, his "student deferment" classification was changed to I-A making him avail-

[1] The applicable statute reads in pertinent part:

"Any . . . person . . . who . . . evades . . . service in the armed forces or any requirements of this title . . . or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction . . . be punished by imprisonment . . ."

able for military service. On September 2, 1966,[2] the draft board mailed to White in New York[3] an order requiring him to report for induction on October 3 at Fort Des Moines, Iowa. On September 10, White mailed the induction order back to the local board and wrote that he would not comply "without my legitimate right of appeal". Time for appeal from the 1964 I-A classification had expired and the local board so advised him.[4] On September 18, White wrote to the local board requesting a special conscientious objector form SSS 150 and the local board mailed him this form approximately eight days later. White returned the completed form, stating his conscientious objector claim, to the local board on October 6. The board considered the claim at a meeting on October 28 and voted not to reopen his classification.[5] Three days after the meeting, the following letter was mailed White:

"October 31, 1966

TO Dan Lee White, 1280 Walton Ave., Apt 31,
Bronx 52, New York

FROM Polk County Local Board No. 13-128

Please be advised that SSS Form 150, Conscientious Objector Form, was considered by the members of this Local Board at the October 28, 1966 meeting, and it was their unanimous opinion that the information presented did not merit reopening.

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[2] All pertinent correspondence between White and his draft board occurred in 1966.

[3] White first registered for the draft in Des Moines. He later moved to New York but the Iowa local Selective Service board retained jurisdiction over him.

[4] Pursuant to 32 C.F.R. § 1626.2, an appeal, except under exceptional circumstances not here present, must be taken within thirty days after notice of classification has been mailed.

[5] Appellant does not take issue with the propriety of this action.

Your Order to Report for Induction is hereby returned. Please report to the nearest draft board and request a transfer for Induction.

BY DIRECTION OF THE LOCAL BOARD

Dorothy Adams, Clerk 13-128"

White at no time reported for induction. He did write the board on December 19 saying in part: "I cannot in any manner partake in the Armed Forces".[6] An indictment returned July 18, 1967, charged that, from October 3, 1966, up to and including the day of the indictment, White willfully and knowingly failed "to comply with an order of his local board to report for and submit to induction into the armed forces of the United States".

In this appeal, White claims that the letter ordered him to do something other than report for induction; namely, to request a transfer for induction.[7] A failure to request

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[6] White's letter of December 19 gave the following reasons for his refusal:

> "In reply to your recent pronouncement on my conscience, I must reiterate that in all good conscience I cannot in any manner partake in the Armed Forces. May history record that I believe that the U.S. Armed Forces are engaged in genocide, perpetual racism and crimes against Mankind. Jesus would not wear the 'green fatiques' and neither shall I. 'To kill or be killed' is the standard euphemism for a 'license to murder.' Any accomodation with the Armed Forces whether with the Medical Corp or Marine Corp is a regression from Man's noble destination, i.e., emulation of Good, i.e., God. (sic) Please be advised that I am mentally and physically unfit for any life in the Armed Forces. Politically I am of the persuasion that the world will be better off once the U.S. Armed Forces, the instrument of racist capitalism, are drastically curtailed. At this crucial moment in history when we observe a heroic struggle of the Vietnamese people to unshackled the chains of racist American oppression, young Americans who know their cause is just, must lend all moral support possible, even to face jail to assert their moral conscience." (sic)

[7] Such a transfer is allowed under the Selective Service regulations for the convenience of the registrant. 32 C.F.R. § 1632.9.

a transfer does not constitute a crime. Therefore, appellant reasons, the court should have entered a judgment of acquittal as a matter of law. Crucial to the resolution of this question is whether the order requiring White to report for induction on October 3 required him to act subsequent to that date.

An induction order imposes a continuing duty on the registrant to submit to induction. United States v. Prince, 398 F. 2d 686 (2nd Cir. 1968); Silverman v. United States, 220 F. 2d 36 (8th Cir. 1955). This Court has said:

> "there was only one offense charged, that offense was failure to report for induction. By the Selective Service Regulations, § 1642.2, 32 C.F.R., it is made a continuing offense. No assault is made upon this regulation. The nature of the offense charged is such that it may upon proper proof be a continuing one." Silverman at 220 F.2d 39.

The pertinent Selective Service regulations provide:

> "When it becomes the duty of a registrant or other person to perform an act, . . . the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act . . . shall in no way operate as a waiver of that continuing duty." 32 C.F.R. § 1642.2.

> "Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction . . . it shall thereafter be his continuing duty from day to day to report for induction . . . to his own local board, and to each local board whose area he enters or in whose area he remains." 32 C.F.R. § 1642.15.

White's contumacious return of the induction order on September 10 did not in any way suspend the effectiveness of that order. Upon receipt of the returned order and White's letter claiming conscientious objector status, the board did not terminate or suspend the induction order.

The trial court instructed the jury, inter alia, that

White could not be found guilty of failing to report for induction during the period from October 3 to the date of his receipt of notice that his claim had been rejected. This instruction was based on the trial court's conclusion that White did not possess the requisite criminal intent to be found guilty of refusing to report for induction during that period. His continued refusal to report after being notified of the board's rejection of his claim supplied the necessary evidence of criminal intent and supports the conviction.

The board's letter of October 31 and accompanying induction order was in no way confusing and clearly conveyed the message that White was required to immediately report for induction. Under the heading: "IMPORTANT NOTICE (Read Each Paragraph Carefully)", the induction order reads in part:

> "Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report. If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you."

Dan L. White is a person of intelligence, possessed of a college degree, and had been engaged in responsible employment. After reviewing the entire record, we are satisfied that the correspondence of October 31 in context would in no way be confusing or misleading to a person of ordinary intelligence. There is no evidence in the record that White was in fact confused or misled in any way. Under these circumstances, the jury was entitled to conclude that he was guilty as charged.

Affirmed.

A true copy.
Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
Central Division

Criminal No. 4-1218-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAN L. WHITE,
Defendant.

MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

Defendant states:

1. The Motion for a Judgment of Acquittal made at the close of the plaintiff's case in chief, and the defendant's case in chief, are renewed as if fully set out herein.

2. The evidence shows that the only induction order issued to defendant ordered him to report for induction October 3, 1966. The Court instructed the jury that from that date until October 31, 1966, defendant is not guilty of refusing to report for induction because the plaintiff was then considering a change in defendant's status to that of conscientious objector. At no time subsequent to this period was defendant ordered to report for induction subsequent to October 3, 1966. To enter a judgment of conviction against the defendant when the conduct of the plaintiff in this case was so clearly misleading as to defendant's obligations, deprives defendant of due process of law.

3. The evidence fails to show plaintiff reached a conclusion, or even considered, the question of when defendant's

claim of conscientious objector matured, which plaintiff was required to do by U. S. v. Geary, 368 F. 2d 144.

4. To reach a verdict of guilty based upon a change of status created by the letter sent defendant by plaintiff on October 31, 1966, gives that letter status as an Order to Report for Induction which it clearly was not, and, as a matter of law, cannot be. U. S. v. Mancusco, 139 F. 2d 950.

5. By admitting into evidence defendant's testimony as to the relation between defendant's conscientious objector application, and his apprehension and beliefs about racial discrimination in the armed forces, yet denying defendant's motion to discover reports of plaintiff's investigations as to such discrimination, and, further, failing to admit expert testimony as to the relationship in defendant's mind between such belief and his objection to serving in the armed forces, defendant was denied the ability to substantiate his claim once made. He was thus left before the jury as one presenting a claim without basis in fact and thus deprived of a fair trial with opportunity to present his full case.

6. By virtue of Jury Instruction 12A, and the evidence, plaintiff has clearly, as a matter of law, failed to prove defendant guilty of refusing to report for induction from October 3, 1966, until the date of the indictment as alleged in the indictment.

WHEREFORE, defendant moves for a judgment of acquittal or, failing that, an order for a new trial pursuant to 18 USCA Rule 29(c) and 18 USCA Rule 33.

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By /s/ Dan Johnston
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DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
Central Division

Criminal No. 4-1218-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAN L. WHITE,
Defendant.

ORDER

This matter is now before the Court upon the motions of defendant Dan L. White for judgment of acquittal or, failing that, an order for a new trial. Upon consideration of the motions and the record herein, the Court finds that said motions should be denied.

IT IS ORDERED that the defendant's motion for judgment of acquittal is hereby denied.

IT IS FURTHER ORDERED that defendant's motion for a new trial is hereby denied.

Dated this 16th day of November, 1967.

/s/ Roy L. Stephenson
Chief Judge